

SERVICE DATE – OCTOBER 31, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35792

THOMAS TUBBS, TRUSTEE OF THE THOMAS TUBBS REVOCABLE TRUST AND INDIVIDUALLY, AND DANA LYNN TUBBS, TRUSTEE OF THE DANA LYNN TUBBS REVOCABLE TRUST AND INDIVIDUALLY—PETITION FOR DECLARATORY ORDER

Digest:¹ The Board finds that claims under Missouri state law seeking compensation from BNSF Railway Company and its contractor, Massman Construction Co., for flooding and property damage allegedly caused by the improper design, construction, and maintenance of BNSF's rail line are preempted by federal law.

Decided: October 29, 2014

In this decision, the Board finds that state law claims in a pending lawsuit in Missouri state court brought by Thomas Tubbs and Dana Lynn Tubbs (Petitioners) against BNSF Railway Company (BNSF) and Massman Construction Co. (Massman) (collectively, BNSF) for flooding and property damage allegedly caused by the improper design, construction, and maintenance of BNSF's rail line are federally preempted by 49 U.S.C. § 10501(b) of the Interstate Commerce Act, as broadened in the ICC Termination Act of 1995 (ICCTA).

BACKGROUND

Petitioners filed a lawsuit in the Circuit Court of Holt County, Missouri, seeking compensation for property damage allegedly caused by BNSF in connection with a flood that occurred during the summer of 2011. The state court granted a stay of that proceeding to allow Petitioners to seek a ruling from the Board on whether their claims are preempted under 49 U.S.C. § 10501(b). On December 9, 2013, Petitioners filed a petition for declaratory order requesting that the Board declare that their state court claims against BNSF are not federally preempted. On January 13, 2014, BNSF replied, arguing that Petitioners' claims are preempted.

Petitioners own a 550-acre farm in Holt County, Mo. adjacent to a BNSF rail line. A portion of BNSF's track sits atop an earthen embankment, which has served as a dam for

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

occasional floodwaters from the Missouri River.² In preparation for anticipated flooding of the Missouri River, BNSF raised its embankment and accompanying mainline track and fortified the entire track structure by placing rock, rip-rap, and other material trackside in May and June of 2011.³ Despite BNSF's efforts, when the Missouri River flooded in the summer of 2011, the flood waters breached the embankment. BNSF then engaged Massman to repair the embankment and track which, according to Petitioners, directed additional current towards Petitioners' farm and caused additional damage.

Petitioners claim that as a result of BNSF's actions, the soil on their farm was washed away, rendering their property virtually worthless.⁴ Specifically, Petitioners allege that, prior to BNSF's raising of the track, the embankment did not contain a sufficient amount of drainage, contrary to BNSF's own internal design criteria. Petitioners also allege that when BNSF raised the track in late spring 2011, it did not widen the footprint of the embankment to accommodate the height, nor did it create additional drainage.⁵ According to Petitioners, BNSF then intentionally created breaches in the embankment in order to prevent the floodwaters from washing out the track.⁶ Petitioners state that the breaches channeled the floodwater to their property, resulting in flooding and irreparable damage.

Petitioners' complaint in state court seeks damages for trespass, nuisance, negligence, inverse condemnation, and statutory trespass under Missouri state law. Petitioners argue that their claims neither interfere with BNSF's rail operations nor intrude on matters exclusively regulated by the Board. Therefore, Petitioners argue, their claims are not preempted by 49 U.S.C. § 10501(b) and should be allowed to proceed in state court.

In response, BNSF argues that because Petitioners' claims relate to the design, construction, and maintenance of BNSF's rail line, Petitioners' claims are preempted under § 10501(b), which gives the Board "exclusive" jurisdiction over "transportation by rail carriers," including rail-related facilities and track.⁷ To support this argument, BNSF cites court cases

² Pet. at 2.

³ Reply at 3-4.

⁴ Pet. at 5.

⁵ Pet. at 3.

⁶ Pet. at 4.

⁷ On September 9, 2014, BNSF also filed a letter in support of its position with an attached order recently issued by the Circuit Court of Holt County dismissing separate claims brought against BNSF by other property owners based on preemption under § 10501(b). Similar to the allegations made by Petitioners, the plaintiffs in that case sought damages for trespass, nuisance, negligence, inverse condemnation, and statutory trespass on the ground that BNSF allegedly harmed their property when it built a rail bridge and widened a culvert resulting in flooding on their property. The court found that claims related to the construction, design, and maintenance of BNSF's rail line constituted regulation of railroad transportation and were thus preempted by § 10501(b).

finding that § 10501(b) preempts state law claims against railroads alleging negligence in design, construction, and maintenance of railroad track. BNSF also asserts that, the issue of preemption aside, its actions did not cause the flooding that damaged the Tubbs' property. BNSF acknowledges that it raised and fortified the embankment, but states that it did not intentionally create the breaches.⁸ Rather, according to the railroad, the unusually severe 2011 flood that breached the embankment was a "500-year flood event" that greatly exceeded the internal design and construction standards for the railroad's track, which were designed only to withstand a 100-year flood event.⁹ Therefore, BNSF argues, none of its actions with respect to this flood were negligent, nor did they violate the internal design and construction criteria BNSF used for this line.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). We find that a controversy exists here concerning whether Petitioners' state law claims are preempted by federal law. Consequently, we will grant this request for a declaratory order and resolve the matter on the record before us.

The Interstate Commerce Act gives the Board broad and exclusive jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a)(1). The statute defines rail transportation expansively to encompass any property, facility, structure or equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). Moreover, § 10102(6) defines "railroad" broadly to include "a switch, spur, track, terminal, terminal facility, [or] a freight depot, yard, [or] ground, used or necessary for transportation."

Section 10501(b) categorically preempts states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, or abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad's right to conduct rail operations or proceed with activities the Board has authorized, such as a construction or abandonment. Thus, state and local permitting or preclearance requirements, including building permits and zoning ordinances are categorically preempted. City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998). Otherwise, state and local authorities could deny a railroad the right to construct or maintain its facilities or to conduct its operations, which would irreconcilably conflict with the Board's authorization of those facilities and operations. Id. at 1031; CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 8-10 (STB served Mar. 14, 2005), pet. for recon. denied (STB served May 3, 2005).

⁸ Reply at 5.

⁹ Reply at 4, 6.

Even where categorical preemption does not apply, state and local actions may be preempted “as applied”—that is, if they would have the effect of unreasonably burdening or interfering with rail transportation. See Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (*en banc*). The Board analyzes the facts and circumstances of the case to determine whether the action is preempted as applied. E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9, 2012).

Section 10501(b) expressly states that “the remedies provided under [49 U.S.C. § 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” Section 10501(b) thus preempts other attempts to regulate that would unreasonably interfere with railroad operations that come within the Board’s jurisdiction, without regard to whether or not the Board actively regulates the particular activity involved. See Pace v. CSX Transp., Inc., 613 F.3d 1066, 1068-69 (11th Cir. 2010) (state law claims related to side track preempted); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008) (state law claims preempted even though Board does not actively regulate spur and side track).

While § 10501(b) is broad and far-reaching, there are, of course, limits. For example, § 10501(b) preemption does not apply to state or local actions taken under their retained police powers, as long as they do not unreasonably interfere with railroad operations or the Board’s regulatory programs. See Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005); N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252-54 (3d Cir. 2007).

In this case, Petitioners’ state law claims are federally preempted, whether they are viewed as “categorical” or “as applied,” because they have the effect of regulating and interfering with rail transportation. Petitioners seek to recover damages from BNSF through state law tort claims, alleging that flooding and property damage were caused by the improper design, construction, and maintenance of BNSF’s tracks. These claims are based on alleged harms stemming directly from the actions of a rail carrier, BNSF, in designing, constructing, and maintaining an active rail line—actions that clearly are part of “transportation by rail carriers” and therefore subject to the Board’s exclusive jurisdiction under § 10501(b). If these claims were allowed to proceed, they would have the effect of managing or governing rail transportation. Franks, 593 F.3d at 410. Whether BNSF took its actions before and during an emergency resulting from a massive flood, as here, or during normal circumstances, state and local regulation of actions based on the railroad’s design, construction, and maintenance standards for railroad track are preempted under § 10501(b). This is so even where the attempted regulation is a tort claim under state law, because damages awarded under state tort laws can manage or regulate a railroad as effectively as the application of any other type of state statute or regulation. See Maynard v. CSX Transp., Inc., 360 F. Supp. 2d 836, 840 (E.D. Ky. 2004); Guckenberg v. Wis. Cent. Ltd., 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992)).

Indeed, a number of courts have found similar attempts to regulate rail transportation federally preempted. See, e.g., Tex. Cent. Bus. Lines Corp. v. City of Midlothian, 669 F.3d 525, 533 (5th Cir. 2012) (city’s attempted regulation of railroad embankment construction

preempted); Maynard, 360 F. Supp. 2d at 841-42 (negligence claims related to flooding allegedly caused by construction and maintenance of tracks preempted); Pere Marquette Hotel Partners, L.L.C. v. United States, 2010 WL 925297 at *5-6 (E.D. La. March 10, 2010) (claims that a railroad negligently designed and constructed railroad crossing, railroad tracks, and roadbed for railroad tracks qualify as an attempt at state law “regulation” and are preempted); In re Katrina Canal Breaches Consol. Litigation, 2009 WL 224072 (E.D. La. 2009) (negligence claims related to flooding allegedly caused by design and construction of railroad crossing, tracks, and roadbed preempted); A&W Props., Inc. v. Kan. City S. Ry., 200 S.W.3d 342, 347-49 (Tex. Ct. App. 2006) (tort claims related to the design of track drainage structures preempted). Cf. Rushing v. Kan. City S. Ry., 194 F. Supp. 2d 493, 500-01 (S.D. Miss. 2001) (tort claims related to railroad’s activities preempted, but claims related to earthen berm adjacent to rail yard allowed to proceed, as berm was not directly related to railroad’s operations).

The purpose of the § 10501(b) preemption is to prevent a patchwork of state and local regulation from unreasonably interfering with interstate commerce. Norfolk S. Ry. Co. – Pet. for Declaratory Order, FD 35701, slip op. at 4, 6 n.14 (STB served Nov. 4, 2013), citing H.R. Rep. No. 104-311, at 95-96 (1995). Petitioners’ claims, if allowed to proceed, would unduly burden interstate commerce and amount to impermissible state regulation of BNSF’s operations by interfering with the railroad’s ability to uniformly design, construct, maintain, and repair its railroad line. The interstate rail network could not function properly if states and localities could impose their own potentially differing standards for these important activities, which are an integral part of, and directly affect, rail transportation.

The cases Petitioners rely on are inapposite. In Emerson v. Kansas City Southern Railway Co., 503 F.3d 1126 (10th Cir. 2007), the plaintiffs owned land adjacent to a railroad track and a drainage ditch. Plaintiffs claimed that the railroad had discarded old wooden railroad ties into the drainage ditch, which impeded the flow of water and caused flooding on their property. The court found that the railroad’s act of discarding old ties into the drainage ditch and failing to maintain the ditch were not related to the movement of passengers or property and therefore were not part of rail transportation under § 10102(9). Emerson, 503 F.3d at 1130-33. On that basis, the court concluded that plaintiffs’ claims were not preempted by federal law. Unlike the situation in Emerson, however, BNSF’s actions here are an integral part of rail transportation as they involve the railroad’s design, construction, and maintenance of its rail lines.

In Guild v. Kansas City Southern Railway, 541 F. App’x 362 (5th Cir. 2013), plaintiffs claimed the railroad was negligent when it allegedly damaged non-mainline track, on which plaintiffs had allowed the railroad to store cars. The court found no preemption for plaintiffs’ negligence claims in that case because the railroad had not explained how the particular claims presented, which only involved alleged damages to non-mainline track owned by plaintiffs, would interfere with rail transportation. Id. at 368; see also Elam v. Kan. City S. Ry., 635 F.3d 796, 813-14 (5th Cir. 2011) (negligence claim involving crossing accident not preempted, in part, because of lack of evidence that the claim would unreasonably interfere with railroad operations). In contrast, this case involves tort claims that challenge a railroad’s design, construction, and maintenance of its track. Because claims like these seek to manage or govern railroad operations, allowing them to go forward would unreasonably interfere with rail

transportation. Accordingly, they are preempted. *See, e.g., Tex. Cent. Bus. Lines*, 669 F.3d at 533 (city's attempt to regulate the design and construction of railroad line embankment preempted).

The Board's decision in Buddy & Holley Hatcher—Petition for Declaratory Order (Hatcher), FD 35581, slip op. at 7 (STB served Sept. 21, 2012), is also inapposite. In Hatcher, the rail line at issue had been authorized for abandonment and petitioners there claimed that, during salvage (removal of the track and ties), drainage was blocked due to the railroad's actions, resulting in flooding and property damage. Under those circumstances, where the line at issue was no longer needed as part of the national rail system, the Board found no preemption of the state law claims. In contrast, Petitioners here seek to pursue state law claims that would have the effect of governing or managing transportation-related activities on an active rail line.

None of the other Board decisions Petitioners cite support a finding of no preemption here. For example, in Mark Lange – Petition for Declaratory Order, FD 35037 (STB served Jan. 28, 2008), the Board found that a potential inverse condemnation claim was not preempted. However, as the Board recently explained in Norfolk Southern Railway, FD 35701, slip op. at 5-6, Lange involved a situation where the petitioner alleged that the railroad had physically taken part of his property by erecting a fence in the wrong location. The Board found that that type of inverse condemnation claim would not necessarily be preempted because, unlike the claim at issue here, the claim in Lange would not manage or govern rail transportation or unreasonably interfere with railroad operations. Lastly, Boston & Maine Corp. v. New England Central Railroad, Inc., FD 34612 (STB served Feb. 24, 2005), is not on point. That case, involving tort and contract claims arising out of a derailment, did not involve a question of preemption. Rather, the issue in that case was whether the Board or a state court had primary jurisdiction over the parties' dispute.¹⁰

In finding preemption here, we reject arguments made by Petitioners that their claims are not preempted because (1) the Board does not directly regulate the design, construction, drainage or maintenance of railroad lines, and (2) there are no remedies available to them under the Interstate Commerce Act. As noted, § 10501(b) preempts regulation that would unreasonably

¹⁰ Petitioners also cite numerous court cases that address the question of whether complete preemption exists for purposes of removal to federal district court. *See, e.g., Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42 (1st Cir. 2008); *Trejo v. Union Pac. R.R.*, 2011 WL 309614 (E.D. Ark. Jan. 28, 2011); *Watkins v. RJ Corman R.R.*, 2010 WL 1710203 (E.D. Ky. Apr. 27, 2010); *Allied Ind. Dev. Corp. v. Ohio Cent. R.R.*, 2010 WL 1524469 (N.D. Ohio Apr. 15, 2010); *Irish v. Burlington N. Santa Fe Ry.*, 632 F. Supp. 2d 871 (W.D. Wis. 2009). *See also Elam*, 635 F.3d at 802-11 (focusing, in part, on complete preemption of a negligence per se claim). These cases are not on point. Whether complete preemption exists to allow for removal of a case from state to federal court is a different question than whether a state law claim is preempted by federal law—the question presented here. *See Fayard*, 533 F.3d at 45, 48-49 (even if complete preemption for removal purposes does not exist, claims may still be preempted when preemption is raised as a defense by the railroad); *Trejo*, 2011 WL 309614 at *5.

interfere with railroad operations that come within the Board's jurisdiction, without regard to whether or not the Board actively regulates the particular activity involved. See, e.g., Port City. Moreover, § 10501(b) preemption applies even though a remedy may not exist under the Interstate Commerce Act for all instances where a state or local law is preempted. See CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (explaining that § 10501(b) preemption of state claims is not limited to claims for which an alternative federal remedy is available). Accord 14500 Limited LLC, FD 35788, slip op. at 5 (STB served June 5, 2014); Norfolk S. Ry., FD 35701.

In short, we find Petitioners' claims of trespass, nuisance, negligence, inverse condemnation, and statutory trespass under Missouri state law to be preempted by 49 U.S.C. § 10501(b).

In addition, Petitioners assert that BNSF's actions violated certain federal regulations enacted by the Federal Railroad Administration (FRA) under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20101, et seq., related to drainage under railroad tracks.¹¹ They further assert that any tort claims based on alleged violations of those FRSA regulations are not preempted by § 10501(b).¹²

The Board has previously explained that where there are overlapping federal statutes, the Board attempts to harmonize the two statutes, with each statute given effect to the extent possible. CSXT Transp., FD 34662, slip op. at 6 (STB served May 3, 2005) (citing Tyrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001)). Here, the FRSA regulations that Petitioners cite are applicable to the entire national rail system and do not directly conflict with the uniform federal regulation of railroads under the Interstate Commerce Act. Accordingly, § 10501(b) does not preempt the FRSA regulations on drainage under railroad tracks. Petitioners' tort claims based on alleged violations by BNSF of these regulations are therefore also not preempted by § 10501(b).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Petitioners' request for a declaratory order is granted to the extent discussed above.

¹¹ See 49 C.F.R. §§ 213.33 and 213.103(c).

¹² BNSF has not argued in its Reply that Petitioners' FRSA-based claims are preempted. Rather, it has suggested that the Board "should refrain from addressing the FRSA arguments raised in the Petition." BNSF Reply at 20. However, because Petitioners specifically ask that we find that their FRSA-based claims are not preempted by § 10501(b), we will decide this issue.

2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.